Boston District Council of Carpenters, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Curry Woodworking, Inc.

Carpenters Local Union No. 33, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Curry Woodworking, Inc. Cases 1–CB–8186 and 1–CB–8187

February 21, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On February 2, 1994, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

This case poses the question of whether the Respondent Unions and the Employer effectively reached a meeting of the minds sufficient to mutually bind themselves to a successor collective-bargaining agreement. Contrary to the judge, who dismissed the complaint, we find that the Respondents made an unconditional contract offer to the Employer and that the Employer accepted that offer in a timely manner, thereby establishing a binding collective-bargaining agreement that the Respondents failed to honor in violation of Section 8(b)(3) of the Act.

Facts

The Employer is in the business of manufacturing and installing architectural millwork. It employs millwork employees in its fabrication shop, as well as installation employees who install the millwork in the field.

On August 23, 1990, the Employer entered into a bargaining relationship with the Respondents covering the Employer's installation employees by signing and adopting a master statewide agreement negotiated between the Respondents and local areawide construction industry employer associations.[1] This agreement was a construction industry prehire agreement authorized under Section 8(f) of the Act. On August 14, 1991, the Employer executed another areawide master agreement with the Respondents entitled ''Acceptance of Agreement,'' which, by its terms, was to expire on May 31, 1993.

In late May 1993, the Respondents and the employer associations[2] negotiated and executed a successor master agreement effective from June 1, 1993, to September 30, 1997.[3] Thereafter on May 28, 1993, the Respondents sent the Employer the following letter:

> Enclosed please find a summary of the recently negotiated changes in the agreement between the Boston District Council of Carpenters and the [Employer associations].
>
> As you will note, the contract is effective on June 1, 1993, but does not require any changes in any of the economic conditions until August 1, 1993. The contract terminates on September 30, 1997 and provides for an economic and language reopener on August 1, 1995.
>
> We are also enclosing two Acceptance of Agreement pages. Would you kindly have a principal officer of the corporation execute both copies of the Acceptance of Agreement and return them to this office in the pre-addressed stamped envelope that we have provided for this purpose. Upon receipt of the two executed copies of the Acceptance of Agreement, this office will then execute both copies and return one copy to your company.
>
> If the Acceptance of Agreement is not signed by an officer of the corporation, please make certain that a letter of authorization executed by a principal officer of the corporation, authorizing the person to sign the Agreement, accompanies that Acceptance of Agreement.
>
> If you have any questions, would you call this office as soon as possible. Unless this office receives a duly authorized Acceptance of Agreement by June 4, 1993, your company will be considered not to have a collective bargaining agreement with the Boston District Council of Carpenters.

[1] At all times material here, the Employer's millwork employees have remained unorganized.

[2] These employer associations were the Associated General Contractors of Massachusetts, Inc.-Labor Relations Division, Boston and Eastern Massachusetts Building Trades Employers Association and the Construction Industries of Massachusetts.

[3] Under the 1993–1997 agreement, economic terms, including employer fringe benefit payments, were to remain unchanged until August 1, 1993. The record shows that signatory employers pay fringe benefit contributions through a dated stamp system in which employers purchase benefit stamps administered by the Massachusetts Carpenters Central Collection Agency. Employers then distribute the stamps to employees consistent with the hours the employee has worked. In order to avoid the administrative burden of printing and distributing new benefit stamps for the period between June 1, the effective date of the agreement, and August 1, 1993, the effective date of the agreement's economic terms, the Respondents continued to honor stamps with a stated expiration date of May 31, 1993, during June and July 1993.

As set forth in the May 28, 1993 letter, the Respondents also enclosed, for the Employer's signature, acceptance of agreement forms entitled ''STATEWIDE AGREEMENT'' stating in pertinent part, as follows:

> The contractor named below (hereinafter the ''Employer'') and the labor organizations named below (hereinafter the ''Union'') hereby agree to the following terms and conditions effective with the date of the signing of this agreement:
>
> 1. The Employer accepts and agrees to abide by the collective bargaining agreements between the various contractor associations and the unions of the United Brotherhood of Carpenters and Joiners of America in the Commonwealth of Massachusetts wherever those contracts shall apply . . .
>
> 2. The duration of this statewide agreement shall be co-extensive with the terms set out in the collective-bargaining agreement referred to in paragraph 1 unless either party to this statewide agreement gives notices of termination of this agreement in accordance with the applicable provisions in the collective bargaining agreement referred to in paragraph 1.
>
> 3. This statewide agreement shall be binding upon the Employer and its successors and assigns and this agreement shall not be nullified or effected [sic] in any manner as a result of any consolidation, sale, transfer, assignment, joint venture or any combination thereof or any other disposition of the Employer.

On June 22, 1993, the Employer signed and dated the aforementioned agreement and mailed the signed copies to the Respondents. On June 23, 1993, Respondent Local 33 Organizer Robert Marshall telephoned Employer President David Curry and asked Curry if he had signed the agreement.[4] Curry then asked Marshall ''if he had looked at his mailbox today . . . the contract's probably in your mail.'' According to Curry's uncontradicted testimony, Marshall replied, ''Well, he didn't have anything to yell at me about,'' and the conversation concluded.

The Employer continued to perform installation work within the Respondents' jurisdiction throughout June and July 1993 without incident. However, on August 2, 1993, the Employer was not permitted to purchase fringe benefit stamps. Thereafter, Curry complained to the Respondents about the denial of the stamps. Curry told the Respondents that ''I felt I had a contract . . . and I felt I should be able to get stamps.'' It is undisputed that Respondent Carpenters District Council President Silins informed Curry that the Respondents would not affix a signature to the agreement signed, dated, and returned by the Employer unless the Employer entered into a bargaining agreement covering the millwork employees in its fabrication shop. Thus, Silins told Curry ''that he was not going to sign with anybody that had a non-union shop.'' As a result of the Respondents' refusal to honor the agreement, the Employer was unable to purchase fringe benefit stamps thereafter or to secure union-represented employees as needed.

Discussion

The General Counsel contends that the Respondents and the Employer had a binding collective-bargaining agreement on June 22, 1993, when the Employer signed the agreement tendered by the Respondents, and that the Respondents violated Section 8(b)(3) when they refused to execute the agreement and honor its terms thereafter. The General Counsel also contends that inasmuch as the parties were bound by the master areawide 1993–1997 agreement, the Respondents also violated Section 8(b)(3) by conditioning execution of the agreement on the union status of employees outside the bargaining unit, a permissive subject of bargaining, and by failing to comply with the agreement so as to deny the Employer the ability to purchase fringe benefit stamps and to hire union-represented employees. We find merit in the General Counsel's contentions.

The threshold question here is whether the parties entered into a contractual agreement pursuant to a viable offer and acceptance. *Sunol Valley Golf Club*, 310 NLRB 357 (1993). More specifically, we must inquire whether the Respondents' communication to the Employer on May 28, 1993, was an unconditional contractual offer to the Employer or, instead, simply an invitation to the Employer to make an offer, which the Respondents at their discretion could then either accept or reject. In order to ascertain whether the Respondents and the Employer entered into, and are bound by, the terms of the master areawide 1993–1997 agreement, we must look to the specific language that the parties used in their communications with one another and the context in which these interactions occurred. For the reasons below, we find that the Respondents' made an unconditional offer and entered into a binding contract when the Employer accepted that offer.

As an initial matter, we note that, prior to the 1993–1997 agreement, the parties maintained a contractual relationship and had been bound by the predecessor agreement. Accordingly, when the Respondents notified the Employer on May 28, 1993, of ''the recently negotiated changes'' in the statewide master agreement, enclosed acceptance of agreement forms, and asked the Employer to ''kindly have a principal officer of the corporation execute both copies,'' it was communicating with a contracting employer and seeking

[4] Respondent District Council President Andris Silins testified that during June and July 1993 he instructed his staff to contact contractors to inquire why ''signature pages'' had not yet been returned.

the continuation of the contractual relationship. In short, the Respondents were not dealing with a stranger employer or simply expressing a desire to explore the possibility of entering into a bargaining relationship.

Second, the plain language of the May 28, 1993 letter is consistent with the notion that the Respondents were making an unconditional offer. Thus, as noted, the letter specifically asks the Employer to execute and return the agreement. The letter, on its face, does not set forth or reasonably contemplate any substantive response other than execution of the agreement as submitted. Indeed, in the letter the Respondents characterize the document to be signed and returned as the ''Acceptance of Agreement.'' Thus, the wording of the letter is incompatible with an interpretation that the Respondents were only inviting the Employer to initiate an offer.

Third, the May 28, 1993 letter does not expressly or implicitly reserve to the Respondents the right to review further the Employer's signed and dated submissions upon their return, or the right to withhold their signature once the Employer has done what the Respondents have asked it to do, that is ''execute both copies of the Acceptance of Agreement and return them to this office.'' On the contrary, the May 28 letter, on its face, states: ''Upon receipt of the two executed copies of the Acceptance of Agreement, *this office will then execute both copies and return one copy to your company*.'' (Emphasis added.)

In sum, at the time of the May 28, 1993 letter the Respondents had concluded negotiations with the employer associations on substantive terms, offered to enter into an agreement with the Employer on those terms, and expressly informed the Employer that once the Employer agreed to those terms by executing the agreement submitted to it, the Respondents would then execute the agreement. Accordingly, the plain meaning of the May 28, 1993 communication to the Employer is that a binding agreement would be created upon the Employer's signed acceptance of the terms offered by the Respondents. On June 22, 1993, the Employer accepted those terms.

In finding that the Respondents and the Employer did not enter into a binding contract, the judge concluded that acceptance of an ''open-ended'' proffer in an 8(f) context is insufficient to create a binding agreement when, as here, there have been no face-to-face negotiations between the parties, and the Employer is simply a ''me too'' signer of an 8(f) agreement negotiated by other parties. We find the judge's reasoning unpersuasive.

As noted, the parties here were not strangers to one another. Indeed, the Respondents took the initiative of communicating with the Employer for the purpose of continuing their contractual relationship. It is immaterial whether that communication was face-to-face or by letter, or whether the Respondents sought additional direct negotiations over contract terms rather than presenting already negotiated terms to the Employer for acceptance or rejection. See *Construction Labor Unlimited*, 312 NLRB 364 (1993) (''me-too'' signatory bound to successor agreement). There is no policy underlying Section 8(f) that requires ''direct'' negotiations between contracting parties or application of a general rule that acceptance of an ''open-ended'' offer is insufficient. One of the essential purposes of the seminal case of *John Deklewa & Sons*[5] was to rectify the instability created by the ability of a contracting party to simply walk away from an agreement at its discretion. When, as here, the factual circumstances demonstrate the creation of a binding agreement, we will hold the parties to the bargain they have voluntarily struck.

The judge found, alternatively, that even if the May 28, 1993 letter was an offer, the offer expired by its terms on June 4, 1993. The May 28 letter states that unless the Respondents receive the acceptance of agreement by June 4, 1993, ''your company will be considered not to have a collective bargaining agreement'' with the Respondents. The record demonstrates, however, that the letter's reference to a June 4 return was not a condition of acceptance or a withdrawal of the offer on that date. Thus, District Council President Silins testified that because of the Memorial Day holiday between May 28 and June 4, ''I knew that I would get some back on June 4th, and they would come in after that, too.'' And, in fact, of the approximately 135 Acceptance of Agreements executed and returned by contractors who had received the identical May 28, 1993 letter, approximately 65 were executed and returned after June 4, 1993, many after June 22, 1993. Further, the systematic effort to contact contractors in June and July 1993 who had yet to return a signed acceptance, as directed by Respondent District Council President Silins, is consistent with a finding that the Respondents did not consider the offer to be withdrawn as of June 4, 1993. In addition, we note that the May 28 letter does not state specifically that execution by June 4 was a condition of acceptance or that the offer would be withdrawn on that date.

Accordingly, we find that the Respondents violated Section 8(b)(3) by failing to execute the 1993–1997 agreement and to honor its terms. We also agree with the General Counsel that, in view of the existence of a binding agreement, the Respondents also violated Section 8(b)(3) by conditioning execution of the agreement on the unionized status of the millwork employees outside of the bargaining unit and by failing to comply with the agreement so as effectively to deny

[5] 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

the Employer the opportunity to purchase fringe benefit stamps and to secure union represented employees.

We emphasize the limits of this holding. We hold only that the facts in this case establish that the parties voluntarily entered into a binding 8(f) contract. If the Respondents had expressly reserved the right to review the Employer's returned submission and made clear that no binding agreement would be established until it formally affixed its signature to the agreement, we would be faced with a different case. Further, nothing in this decision should be construed as limiting a union's independence not to enter into an 8(f) contract with any employer with whom it prefers not to contract. We only hold here that once a union *does* enter into an 8(f) contract with an employer it may not walk away from that agreement with impunity during its term.

Finally, we agree with the General Counsel's argument on exceptions that the Respondents also violated Section 8(b)(3) by attempting to condition execution of the contract on a permissive subject of bargaining—the Employer's agreement to put certain nonunit employees under an 8(f) union contract. Silins' statement to Curry that the Respondents would ''not sign with anybody that had a non-union shop'' made this condition unmistakably clear. Other record evidence reveals that this was a reference to the Employer's millwork employees, who were not part of the installers unit covered by either the previous agreements or the agreement signed by the Employer. Such insistence on matters pertaining to employees outside the unit amounts to insistence on a nonmandatory subject of bargaining, which violates Section 8(a)(5) if engaged in by an employer and Section 8(b)(3) if engaged in by a labor organization. See, generally, *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958); *Utility Workers Local 111 (Ohio Power Co.)*, 203 NLRB 230, 240 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974).[6]

REMEDY

Having found that the Respondents have engaged in unfair labor practices, we shall order that the Respondents cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

Inasmuch as we have found that the Respondents and the Employer are bound to the 1993–1997 statewide agreement tendered to the Employer on May 28, 1993, we shall order the Respondents to execute that agreement on request and, on execution, inform the Massachusetts Carpenters Central Collection Agency that the Employer is a party to the agreement so that the Employer may become eligible to purchase fringe benefit stamps.

ORDER

The Respondents, Boston District Council of Carpenters, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO and Carpenters Local Union No. 33, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Boston, Massachusetts, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to execute the 1993–1997 statewide agreement tendered to Curry Woodworking, Inc. on May 28, 1993.

(b) Conditioning execution of the 1993–1997 statewide agreement on the willingness of Curry Woodworking, Inc. to execute a bargaining agreement covering its millwork fabrication employees notwithstanding the Respondent's obligation to execute the 1993–1997 statewide agreement tendered to Curry Woodworking, Inc. on May 28, 1993.

(c) Failing and refusing to comply with the 1993–1997 statewide agreement so as effectively to deny Curry Woodworking, Inc. the opportunity to purchase fringe benefit stamps and to secure union-representated employees.

(d) In any like or related manner engage in conduct in derogation of its statutory duty to bargain.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by Curry Woodworking, Inc., execute the 1993–1997 statewide agreement tendered to Curry Woodworking, Inc. on May 28, 1993.

(b) On execution of the 1993–1997 statewide agreement notify the Massachusetts Carpenters Central Collection Agency that Curry Woodworking, Inc. is a signatory to that agreement.

(c) Post at its business offices and meeting halls copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken

[6] The administrative law judge expressed the view that the General Counsel's theory made this violation dependent on a preliminary finding that the Respondents acted unlawfully in declining to execute the collective-bargaining agreement. Because he was dismissing the failure-to-execute allegation, he therefore also dismissed the insistence-on-a-permissive-subject allegation. As set forth above, we are reversing the failure-to-execute dismissal, so there is no impediment to our finding the additional violation for insistence on a permissive subject of bargaining.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Furnish to the Regional Director for Region 1 signed copies of the attached notice for posting by Curry Woodworking, Inc., if willing, at its office or places where notices to employees are customarily posted. Copies of the notice, to be furnished by the Regional Director for Region 1, shall, after being duly signed by the Respondents as indicated, be forthwith returned to the Regional Director for disposition.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to execute the 1993–1997 statewide agreement tendered to Curry Woodworking, Inc. on May 28, 1993.

WE WILL NOT condition execution of the 1993–1997 statewide agreement on the willingness of Curry Woodworking, Inc. to execute a bargaining agreement covering its millwork fabrication employees notwithstanding our obligation to execute the 1993–1997 statewide agreement tendered to Curry Woodworking, Inc. on May 28, 1993.

WE WILL NOT fail and refuse to comply with the 1993–1997 statewide agreement so as effectively to deny Curry Woodworking, Inc. the opportunity to purchase fringe benefit stamps and to secure union-represented employees.

WE WILL NOT in any like or related manner engage in conduct in derogation of our statutory duty to bargain.

WE WILL, on request by Curry Woodworking, Inc., execute the 1993–1997 statewide agreement tendered to Curry Woodworking, Inc. on May 28, 1993.

WE WILL, on execution of the 1993–1997 statewide agreement, notify the Massachusetts Central Collection Agency that Curry Woodworking, Inc. is a signatory to that agreement.

BOSTON DISTRICT COUNCIL OF CARPENTERS, AFFILIATED WITH UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

CARPENTERS LOCAL UNION NO. 33, AFFILIATED WITH UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

Gene Switzer, Esq., for the General Counsel.
Christopher N. Souris, Esq., of Boston, Massachusetts, for the Respondents.
Carol Chandler, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Boston, Massachusetts, on November 9 and 10, 1993, on the General Counsel's consolidated complaint which alleged generally that the Respondents refused to execute a collective-bargaining agreement and subsequently repudiated the agreement, both in violation of Section 8(b)(3) of the National Labor Relations Act.

The Respondents generally denied having committed any unfair labor practices and affirmatively contend that since the expiration of the 1991–1993 master agreement, they have not had a contract with the Charging Party.

Following the close of the hearing, counsel submitted briefs. On the record as a whole,[1] including my observation of the witnesses, briefs, and arguments of counsel, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

The Charging Party, Curry Woodworking, Inc. (Curry), has its principal place of business in Waymouth, Massachusetts, where it is engaged in the manufacture and installation of architectural millwork. In the course of this business, Curry annually receives directly from points outside the Commonwealth of Massachusetts goods, products, and materials valued in excess of $50,000. The Respondents admit, and I find, that Curry is an employer engaged in interstate commerce within the meaning Section 2(2), (6), and (7) of the Act.

[1] The General Counsel's posthearing motion to reopen the record to add stipulations and receive certain exhibits is granted.

[2] At the hearing the General Counsel moved to amend the complaint to add inducement of a work stoppage as also violative of Sec. 8(b)(3). Since this allegation is dependent on the existence of a contract, which I conclude was not the case, this proposed amendment need not be considered.

II. THE LABOR ORGANIZATIONS INVOLVED

Boston District Council of Carpenters (District Council) is the central governing body of nine affiliated local unions, including Locals 33 and 51. The Respondents admit, and I find, that the District Council, Local 33, and Local 51 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts in Brief*

The District Council has approximately 8000 members, of whom about 6000 are covered under the master agreement the District Council negotiates with three employer associations. Another approximately 6000 employees work for outside contractors and are covered under the master agreement when working within the geographical jurisdiction of the District Council. There are in the range of 500 contractors who have signed a ''State-Wide Agreement'' by which they became parties to the master agreement, about 200 of whom employ fewer than five carpenters. This is a construction industry prehire agreement authorized by Section 8(f) of the Act.

This document is also signed by two individuals designated as ''Authorized Agents for the Unions in the Commonwealth of Massachusetts.'' One of the union signatories is Andris Silins, president of the District Council. By its terms, the statewide agreement binds an employer to contracts in areas beyond that of the District Council; however, material here is the District Council master agreement and stipulations to be bound by it.

Curry has been in existence since 1990 and has been engaged in the business of manufacturing and installing architectural millwork. Its employees in the fabrication shop are not union; however, on August 23, 1990, Curry became a party to the District Council's master contract by executing the statewide agreement and thereafter has used union employees for installation, primarily of millwork which it manufactures. On August 14, 1991, Curry became bound to the 1991–1993 master agreement by executing a document entitled ''Acceptance of Agreement'' with the District Council. This is a different from the statewide agreement signed by Curry in 1990 and 1993, but so far as material here it had the same language.

By its terms, the District Council master agreement expired on May 31, 1993, prior to which the District Council gave notice of its desire to negotiate changes. Its representatives and those of the employer associations met to negotiate a successor, which was consummated in late May. The successor agreement is effective from June 1, 1993, through September 30, 1997; however, the economic changes, including fringe benefit payments by employers, were not to be effective until August 1, 1993.

By letter of May 28, Silins and Executive Secretary/Treasurer of the District Council David P. Dow informed all contractors who had been parties to the previous master agreement of the negotiated changes. They noted that the effective date of the new contract would be June 1, but there would be no changes in economic terms until August 1. Two copies of the statewide agreement were enclosed to be signed and returned. Then the District Council would execute them and send one copy back to the contractor.

This letter concludes: ''Unless this office receives a duly authorized Acceptance of Agreement by June 4, 1993, your company will be considered not to have a collective bargaining agreement with the Boston District Council of Carpenters.''

David Curry, president and treasurer of Curry, testified that he received this letter and the blank statewide agreement but, for reasons he was unable to explain, did not sign and return them until June 22. In evidence are 72 agreements signed on or before June 4 and another 63 signed subsequently. Similarly, in 1991, Curry did not sign and return the acceptance stipulation until about 2 weeks after the deadline set by the District Council.

Curry continued to do installation work within the District Council's jurisdiction throughout June and July; but in August, he was not allowed to buy stamps which would evidence that fringe benefit payments had been made (these included pension, health, dues, and contributions to industry trust funds).

Harry R. Dow, director of the Massachusetts State Carpenters Central Collection Agency (which administers collection of fringe benefit payments on behalf of the District Council and others) wrote Curry on August 13: ''After reviewing our contract files, we have come to realize your employer record reflects that you are not signatory to the Collective Bargaining Agreement with the Union at this time. Therefore, we are returning check nos. 4726 and 4768 that you forwarded to our attention for benefit payments.''

Silins testified that he received the signed agreement from Curry, but he did not sign it because he ''had been informed that Curry had a non-union shop.''

Curry testified that on August 2 he attempted to purchase stamps and was informed that he could not do so (which prompted his sending checks to cover the fringe benefits payments directly to the collection agency). He then went to the offices of the District Council and there talked to Bob Marshall, an organizer for Local 33 (installation), and Henry Welsh, business manager for Local 51 (fabrication). They were joined by Larry Morrisroe, business manager for Local 51, someone from Local 40, and finally David Dow.

According to Curry the conversation focused on the amount of nonunion millwork coming into the Boston area (which included the millwork Curry installed). Curry was told that the unions were attempting to clamp down on the nonunion goods coming into Boston.

After Dow left, Curry continued talking to Welch. Curry testified: ''I kept bringing up the bring that [sic], you know, I felt I had a contract with the Boston District Council and that, you know, I felt I should be able to get stamps. He made the statement that I wouldn't get the stamps until I signed with 51.''

Curry testified that the next day he talked to Silins who said ''he had talked to his lawyer and his lawyer said that they felt that they didn't have a contract and that he didn't have to sign with anybody for any reason.'' ''He also went on to say that, you know, the philosophy has changed there, that it is going to be union-made, union-installed.'' Finally, Silins told Curry ''that he was not going to sign with anybody that had a non-union shop.''

B. *Contentions of the Parties*

The General Counsel alleged that the District Council and Curry have an enforceable collective-bargaining agreement which the District Council refused to execute and subsequently repudiated in various ways. Specifically, it is alleged that the District Council abrogated the contract when it instructed the collection agency (which in turn instructed the bank) not to sell Curry stamps. This had the effect of causing Local 33 members not to work for Curry.

Finally, it is alleged that the District Council engaged in this conduct in order to force Curry to recognize Local 51 as the bargaining representative of its shop employees. Since such is not a mandatory subject of bargaining, the District Council's refusal to execute and abide by the agreement was unlawful.

Under either theory, the General Counsel alleged that the Respondents thereby breached their bargaining obligations under Section 8(d) and therefore violated Section 8(b)(3) of the Act.

The General Counsel specifically does not contend that absent an enforceable contract, the Respondents nevertheless violated the Act by making Curry's recognition of Local 51 a condition for signing the contract.

The Respondents argue that they no longer had a contract with Curry following expiration of the 1991–1993 agreement. The Respondents admit that the new agreement was not executed by the District Council because Curry had a nonunion fabrication shop. The Respondents contend that under the Act they have the right to accept into a bargaining relationship whomever they choose.

Though admitting that unsigned copies of the acceptance agreement were sent to Curry, the Respondents contend that the District Council reserved the right not to execute the stipulation agreement with any given contractor. That is, they argue, sending the May 28 letter copies of the acceptance was not a contractual offer. So far as the independent contractors were concerned, the District Council became bound only when its authorized representatives signed the returned acceptance, notwithstanding the contractor had signed it and irrespective of whether the contractor signed before or after June 4.

C. *Analysis and Concluding Findings*

The issue here is whether at any time after May 31, 1993, Curry had a prehire contract with the District Council. The General Counsel's principal contention is that the May 28 letter was an offer which Curry accepted by signing the statewide agreement on June 22, relying on the Board's *Pepsi-Cola* rule. The Respondents argue that even if the May 28 letter is construed as an offer, it expired by its terms on June 4 after which it was not available for acceptance.

In *Pepsi-Cola Bottling Co.*, 251 NLRB 187 (1980), enfd. 708 F.2d 495 (9th Cir. 1983), the Board held that a contract offer remains available for acceptance unless expressly withdrawn, or unless circumstances, such as occurrence of an express contingency, would reasonably lead the parties to believe it had been withdrawn. See also *Hydrologics, Inc.*, 293 NLRB 1060 (1989).

With court approval, the Board has concluded that the rules of contract law with regard to offer and acceptance are not strictly applicable to collective-bargaining agreements because of the special statutory obligations requiring bargaining. On the other hand, these rules are not to be rejected summarily.

Thus, in *Worrell Newspapers*, 232 NLRB 402 (1977), the Board held that how long an offer remains open depends on the surrounding circumstances. And in *Crown Cork & Seal Co.*, 268 NLRB 1089 (1984), the Board found that a lapse of 8 to 10 months before acceptance by the union sufficient to conclude that the offer was no longer open.

In *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989), relied on by the General Counsel, the company argued that its negotiators made their offer contingent on ratification by the striking employees, who rejected it. Nevertheless, the Board found that the offer remained available for acceptance when the union did so 5 weeks later. The union and the company continued to talk and never did the company suggest the offer was withdrawn. Indeed, the company implemented the offer and wrote employees urging they consider its fairness. By its conduct, the company indicated that the offer remained viable, and any condition which may have been placed on its acceptance was overcome.

The rationale for looking beyond specific rules of offer and acceptance is based on the underlying policy of the Act—to protect the employees' statutory right to bargain collectively. Thus, minor lapses should not operate to deny them the benefits of an agreement. Further, the overall conduct of the employer should be considered in determining whether there was a meeting of the minds on a total contract.

This policy is not so operative where, as here, there are no identifiable employees of the employer when the contract is executed and there is no bargaining relationship established under Section 9(a) of the Act. A construction industry relationship permitted by Section 8(f) would not seem to bring into play the same policy considerations as a bargaining relationship established after the employees have selected a representative. Indeed, the Board has held that different rules concerning the duty to bargain apply in 8(f) situations. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

Not only is this an 8(f) situation, there has never been anything resembling negotiations between Curry and the District Council. The District Council negotiates with employer associations of which Curry is not a member. At most, Curry has agreed to be bound by a contact between other parties.

Since, under *Deklewa*, an 8(f) bargaining relationship does not survive an expired contract, to renew the relationship would require mutual assent. And this, at a minimum, would require demonstration of assent by execution of some document by the principals, or their agents. I conclude that acceptance of an open-ended offer in an 8(f) situation would not suffice to bind both parties.

Beyond that, if the May 28 letter was an offer, by its terms it expired on June 4.[3] Therefore, any contractor who signed the statewide agreement subsequently was making an offer to the District Council, which could be accepted or rejected. In the case of Curry, the District Council choose to reject the offer. The fact that the District Council accepted a large number of agreements returned after June 4, or that in 1991 Curry returned the acceptance after the stated date

[3] The effect, had Curry signed and returned the acceptance agreement prior to June 4, need not be considered.

which was accepted by the District Council, should not affect the District Council's right to reject Curry subsequently.

But, the General Counsel argues, since Curry worked under the contract during June and July, as evidenced by the fact that he bought fringe benefit stamps, it must be found that he and the District Council had an agreement.

Although being able to buy fringe benefit stamps is some evidence that the parties have a contract, on the facts here I conclude that fringe benefit payments in June and July were, and were meant to be, under the old contract.

In brief, the stamp system administered by the collection agency is a method by which employees covered under the various collective-bargaining agreements can be assured that the appropriate fringe benefit payments have been made on their behalf. An employer, in effect, makes these payments in advance by buying the stamps from a bank which is authorized to sell them. The stamps are sold in hourly denominations and cost whatever the hourly fringe benefit rate is times the number of hours designated. Each payday, stamps are given an employee consistent with the number of hours he worked. At the end of the month, the employer then makes a report to the collection agency naming the employees and the hours they worked and their respective accounts are credited if the employer's payments are sufficient. If the employer has made insufficient payments (that is the stamp purchases do not correspond to the report) then there is a process by which more money is collected by the agency.

Because the fringe benefit payments are constant for a specific period, usually 1 year, each stamp will reflect inclusive dates, e.g., ''VALID 8–1–91 TO 5–31–93.'' Since many large contractors buy stamps in blocks, if an employer's stamp purchases exceed the hours worked by employees, there is a process by which the employer is credited.

Inasmuch as the economic terms of the new contract were not to change until August 1, it was determined by the administrators that stamps applicable for the old contract would continue to be sold through June and July. Although the new contract has an effective date of June 1, in practice it did not become effective until August 1. Further, according to Silins, there were other substantive changes, particularly with regard to certain workmen's compensation benefits allowed by Massachusetts law to be negotiated, about which employers had questions.

The stamp system is complicated, involving hundreds of contractors, thousands of employees, and millions of dollars. It is therefore credible, and I find, the administrative difficulty and cost of changing the stamps for the June–July period, where there was no change in the hourly payments, made doing so unreasonable. It was simply more cost effective to treat the 1991–1993 contract as continuing until August 1. Thus employers were notified by the collection agency that irrespective of the expiration date of 5–31–93 on the stamps, they would be good until August 1.

There are about 500 employers under contract with the District Council covering about 6000 local and an equal number of traveling employees. It is believable that Curry, with his two to four employees, was not a high priority with the District Council. The District Council might have prohibited Curry from buying stamps during June and July, but I cannot conclude that its failure to do so meant acceptance of a contract with Curry.

I further reject the General Counsel's contention that by mutually applying the contract Curry and the District Council became bound to it. The Board has expressly held that the ''adoption-by-conduct doctrine'' is not applicable to 8(f) cases. *Garman Construction Co.*, 287 NLRB 88, 89 fn. 5 (1987). As noted above, 8(f) bargaining relationships are different, and are to be treated differently, from normal 9(a) relationships.

Finally, the General Counsel contends that in a conversation initiated by Robert Marshall, an organizer for Local 33, the Respondents accepted Curry's late signing of the contract and thereby became bound by it. Curry testified that Marshall called him on June 23 and asked if Curry had signed. Curry asked if he had looked in his mailbox that day, that the contract was probably there. Marshall then said ''he didn't have anything to yell at me about.''

The General Counsel argues that Marshall was an agent of the District Council and therefore his call was binding on the District Council. No doubt Marshall made the call because he was directed to do so. All previous contractors who had by then not returned a signed acceptance stipulation were contacted to find out their status.

However, the call clearly could not bear on whether Curry and the District Council had a contract when Curry signed the acceptance on June 22, since it occurred the next day. Curry did not act in reliance on some statement made by Marshall, whether or not Marshall had actual or apparent authority to bind the District Council. Further, Marshall's ambiguous statement could scarcely be considered ratification of the contract with Curry, nor could it override the fact that Silins refused to sign it.

The General Counsel's essential argument, and the cases cited in support, involve a collective-bargaining relationship and actual negotiations between the employer and the representative of its employees. And the issue is whether as a result of those negotiations a complete agreement was reached. Such was not the situation here. The District Council negotiated with three employer associations, none of which counted Curry as a member. Neither Curry nor anyone acting on Curry's behalf actually negotiated with the District Council. The District Council does attempt to persuade nonassociation members, such as Curry, to accept the agreement. But there is never any negotiation over its terms. A nonmember employer and the District Council simply agree to accept the master agreement, or they do not. From the testimony of Silins, which I credit, and the total record, I conclude that mutual acceptance is complete only when both parties have in fact signed the acceptance agreement.

I therefore conclude that after expiration of the 1991–1993 master agreement, Curry was not a party to the District Council's contract with the employer associations.

Curry testified to conversations he had with representatives of the District Council and certain locals during August, the effect of which was he would not be accepted as long as he operated a nonunion shop. The Respondents did not contest this testimony. Indeed, Silins admitted that he refused to execute the agreement with Curry because Curry was a nonunion fabricator.

The General Counsel seems to argue that the District Council would have signed the contract with Curry if he agreed to have his shop employees under contract with Local 51, a condition which is not a mandatory subject of bargain-

ing. However, the General Counsel specifically disclaimed proceeding on a theory that the District Council made acceptance of a contract with Local 51 contingent on its acceptance of Curry under the master agreement. The General Counsel's argument with regard to the shop employees is therefore dependent on finding that Curry and the District Council had a contract. Because I conclude they did not, this aspect of the case need not be further considered.

Finally, I conclude that the District Council has the right not to sign a contract with a nonunion fabricator. The District Council's members do not have to work for a company whose principal business is to install millwork made by nonunion employees. Curry has no right to have an 8(f) contract with the District Council. Any labor contract is a matter of mutual assent. Here, for lawful reasons, the District Council choose not to assent to a contract with Curry and did not violate Section 8(b)(3) of the Act.

[Recommended Order for dismissal omitted from publication.]